

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

RANDALL'S ISLAND FAMILY
GOLF CENTERS, INC., ET AL.,

Debtors.

Hearing Date: February 16, 2001
Time: 10:00 a.m.

Case Nos. 00-41065-smb
through 00-41196-smb

Chapter 11

**OBJECTION OF THE CITY AND COUNTY OF DENVER, COLORADO
TO THE ASSUMPTION AND ASSIGNMENT OF ITS CONCESSION LICENSES**

To the Honorable Stuart M. Bernstein
Chief United States Bankruptcy Judge

The City and County of Denver ("Denver"), a creditor in the above-captioned bankruptcy case, by and through its local counsel, Harter, Secrest, & Emery LLP, objects to the assumption and assignment of its Concession Licenses, pursuant to 11 U.S.C. section 363 (the "Bankruptcy Code"), for the reasons set forth below:

BACKGROUND

1. On or about May 4, 2000 (the "Filing Date"), the Debtors filed a petition for relief under chapter 11 of the Bankruptcy Code.
2. The Court has jurisdiction over this motion pursuant to section 157 of title 28, United States Code.
3. Pursuant to three Concession Licenses (the "Licenses" or "Denver Concession Licenses") each Debtor entered into Licenses with Denver to operate three golf course facilities owned by the City and County of Denver.

4. The first License, entered into with Seven Iron, Inc., is dated July 20, 1988, and was amended on June 28, 1993 and on June 1, 1999 (the “Seven Iron License”). The Seven Iron License and its Amendments are attached as “Exhibits A, A-1 and A-2.” The Seven Iron License was for the operation of the property of Denver located at John F. Kennedy Golf Course, 10500 East Hampden Avenue, Denver, Colorado.

5. The second License, entered into with Evergreen Golf Course, LLC, is dated May 1, 1998, and was amended on November 10, 1998 (the “Evergreen License”). The Evergreen License and its Amendment are attached as “Exhibits B and B-1.” The Evergreen License was for the operation of the property of Denver, a Denver Mountain Park as defined at §31-25-216 Colorado Revised Statutes, located at Evergreen Golf Course, 29614 Upper Bear Creek Road, Evergreen, Colorado.

6. The third License is dated January 27, 1994 and was assigned to Overland Park Golf Course, LLC, on February 20, 1998, and it was amended on June 1, 1999 (the “Overland License”). The Overland License, its assignment, and its amendment are attached as “Exhibits C, C-1, and C-2.” The Overland License was for the operation of the property of Denver located at Overland Golf Course, 1801 South Huron Street, Denver, Colorado.

7. Each of the Denver Concession Licenses contains this opening paragraph:

The City and County of Denver, hereinafter referred as the “City,” acting by and through its Manager of Parks and Recreation hereinafter referred to as the “Manager,” pursuant to the authority granted in Section A4.4.3 of the Charter of the City and Country of Denver and pursuant to the manner, terms and conditions fixed by the Mayor’s Cabinet, and hereinafter set forth, hereby grants to the Concessionaire hereinafter named the license or privilege of operating a concession or selling goods and services in the park or recreational facility hereinafter described.

See, Exhibits A, B & C (emphasis added.)

DEFAULTS

8. Monetary defaults exist under the Denver Concession Licenses. The defaults under the Seven Iron License consist of pre- and post petition taxes in the amount of \$4,406.48, with an additional \$2,715.73 due in April 2001, plus prepetition license payments in the amount of \$1,061.81. The defaults under the Evergreen License consist of \$3,682.78 in prepetition license payments and \$23,083.33 in postpetition payments, for a total monetary default of \$26,766.11. The defaults under the Overland License consist of \$2,705.25, in prepetition tax payments and an additional \$1,677.82 will be due for taxes in April 2001, plus \$378.10 is due for prepetition license payments and \$42,063.57 is due for postposition license payments.

9. The Seven Iron License obligates the Debtor to remain current on all tax payments. Exhibit A. Additionally, Debtor is required to adequately staff and clean the facility. Exhibit A. The Debtor is required to maintain adequate inventories necessary to meet the obligations contained in the License under the Terms and Conditions. Exhibit A. The Debtor has defaulted under these non-monetary provisions of the License. Lastly, and most importantly, the License is not assignable without the permission of the City. See, Terms And Conditions of Exhibit A, paragraph 18. The Debtor's motion to auction off assets, including Denver's Concession Licenses, violates this paragraph of the Seven Iron License.

10. The Evergreen License obligates the Debtor to remain current on all tax payments. Exhibit B. Additionally, the Debtor must adequately staff and clean the facility. Exhibit B. The Debtor has defaulted under these provisions of the license. The Debtor must maintain adequate inventories necessary to meet the obligations contained in the License. Exhibit B. In fact, this Court recently allowed all inventory for this facility to be sold and the pro

shop to be emptied of all inventory under motion of the Debtor filed December 20, 2000¹. While minimum levels of inventory were required only during the most active sales periods, Denver never contemplated the shops would not contain any inventory. The breach of the Evergreen License with respect to the pro shop inventory is indisputable. Lastly, and most importantly, the license is not assignable without the permission of the City. See, Exhibit B. The Debtor's motion to auction off assets, including Denver's Concession Licenses, violates this paragraph of the Evergreen License.

11. The Overland License calls for Debtor to remain current on all tax payments. See, Exhibit C. The Debtor must adequately staff and clean the facility. Exhibit C. The Debtor has defaulted under these provisions of the license. The Debtor must maintain adequate inventories necessary to meet the obligations contained in the license. Exhibit C. In fact, this Court recently allowed all inventory for this facility to be sold and the pro shop to be emptied of all inventory under motion of the Debtor filed December 20, 2000. While minimum levels of inventory were required only during the most active sales periods, Denver never contemplated the shops would not contain any inventory. The breach of the license with respect to the pro shop inventory is indisputable. Lastly, and most importantly, like the other Licenses, the Overland License is not assignable without the permission of the City. See, Terms and Conditions of Exhibit C, paragraph 19. The Debtor's motion to auction off assets, including Denver's Concession Licenses, violates this paragraph of the Overland License.

PROCEDURE TO OBTAIN A LICENSE

12. In order to apply for a concession license the City of Denver requires the prospective concessionaire to submit a response to a request for proposal ("RFP"). The RFP

¹ The notice of this motion was received by the Denver City Attorney's Office December 27, 2000 with the objections due January 3, 2001, by 10:00 a.m. mountain standard time.

requires that the experience and resources of the proposed concessionaire be disclosed. A responsive proposal must demonstrate the financial capability of the prospective concessionaire, and provide financial references. This information, along with the other information provided in a response to the RFP, is utilized by Parks and Recreation Department to determine if a proposed concessionaire is a qualified candidate.

13. The Denver Concession Licenses require the concessionaire to post at \$50,000.00 performance bond or letter of credit to insure performance of all the duties and obligations under each of the Licenses.

14. The Denver Concession Licenses require the concessionaire to provide a one million-dollar (\$1,000,000) indemnity insurance policy for each license. If the concessionaire is going to serve alcohol on the premises, it must obtain an additional one million-dollar (\$1,000,000) indemnity insurance policy for each license. Currently, alcohol is served at all three golf facilities under liquor licenses issued to the individual concessionaires.

PARKS AND RECREATION DEPARTMENT HAS THE SOLE AUTHORITY TO BIND THE CITY AND COUNTY OF DENVER

15. Pursuant to the charter of the City and Country of Denver, Colorado, no entity, other than the Department to Parks and Recreation, has the authority to bind the City and County of Denver to any Concession License. See, Revised Municipal Code of the City and County of Denver, Colorado, Vol. 1, Art. IV, ¶ A 4.4-3.

RELIEF REQUESTED

16. Pursuant to 11 U.S.C. section 365(c) a trustee cannot assume or assign any executory contract or unexpired lease of the debtor if applicable law excuses a party from accepting performance by an entity other than the debtor.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignments of rights or delegation of duties, if-

(1)(A) applicable law excuses a party, other than the debtor, to such contract lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment

11 U.S.C. §365(c)(1) (emphasis added).

17. Case law is clear that if a governmental authority has the exclusive power to grant a license or a lease than that governmental authority must approve the assignment of its license or lease, in order for that license or lease to be assigned. *See, e.g. In re Midway Airlines, Inc.*, 6 F.3d 492 (7th Cir. 1993)(if the contract is silent as to a trustee's ability to assume and assign, the court should look at state law to determine if it is assignable); *In re West Electronics Inc.*, 852 F.2d 79 (3rd Cir. 1988)(if non-bankruptcy law provides that the government would have to consent to an assignment of the contract, than the contract cannot be assumed); *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir. 1984)(assignment of a franchise agreement was not allowed due to a state statute); *In re Braniff Airways, Inc.*, 700 F.2d 935 (7th Cir. 1983)(a trustee cannot assume or assign a lease if applicable law excuses the lessor from accepting performance from an assignee and the lessor does not consent tot he assignment). In each of these cases a governmental agency had exclusive authority to grant a third party a lease or license. In each case the Court required the governmental agency's approval, either in the agreement itself or in a

bankruptcy proceeding, to approve the assumption and/or assignment of the lease or license in question. If the governmental agency did not approve the assumption and/or assignment the court denied the debtor's motion to assume and assign.

18. It is clear that the Municipal Code of the City and County of Denver is "applicable law." *See*, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 348 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6304; S. Rep. No. 95-981, 95th Cong., 2d Sess. 59 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5845. The Municipal Code specifically states that the exclusive authority to bind the City and County of Denver to a concession license is given to the Department of Parks and Recreation. Furthermore, the Denver Concession Licenses provide that the license cannot be assigned without the written consent of the Department of Parks and Recreation. Since the applicable law indicates that no other entity has the authority to bind the City and County of Denver and the licenses require the consent of the Department of Parks and Recreation prior to any assignment, the Denver Concession Licenses cannot be assigned without the City and County of Denver's consent.

19. Finally, the City and County of Denver does not consent to the assignment of the Denver Concession Licenses pursuant to section 365(c)(1)(B), and therefore the Denver Concession License cannot be assumed or assigned.

WHEREFORE, Denver respectfully requests that this objection be granted in full, that the Court deny the assumption of the Denver Concession Licenses and granting such other and further relief as this Honorable Court deems just, fair and proper.

Date: February 6, 2001
Rochester, New York

HARTER, SECREST & EMERY, LLP

By: *Ingrid S Palermo*

Ingrid S. Palermo
700 Midtown Plaza
Rochester, New York 14604
Telephone: (716) 232-2152

J. WALLACE WORTHAM, JR.
City Attorney
LAURIE J. HEYDMAN
Assistant City Attorney

Laurie J. Heydman
Assistant City Attorney
Attorneys for City and Country of Denver
1437 Bannock Street, Room 353
Denver, Colorado 80202
Telephone: (720) 913-3275

To: Jonathan L. Flaxer, Esq.
Golenbock, Eiseman, Assor & Bell
437 Madison Avenue
New York, NY 10022

Edward S. Weisfelner, Esq.
Berlack, Israel & Liberman
120 West 45th Street
New York, NY 10036

Richard S. Toder, Esq.
Morgan, Lewis & Bockus, LLP
101 Park Avenue
New York, NY 10178

Brian Shoici Masumoto, Esq.
Office of the United States Trustee
33 Whiteall Street, 21st Floor
New York, NY 10004

Exhibits are not attached due to their voluminous nature. Please contact creditor's counsel for a copy.